

**1249D PHYSICAL ABUSE OF AN ELDER PERSON: RECKLESS
CAUSATION OF GREAT BODILY HARM — § 940.198(3)(a)**

Statutory Definition of the Crime

Physical abuse of an elder person¹, as defined in § 940.198(3)(a) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to an elder person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

“Cause” means that the defendant’s act was a substantial factor in producing the bodily harm.²

“Great bodily harm” means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.³

2. The defendant recklessly caused great bodily harm to (name of victim).

This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).⁴

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).⁵

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.⁶

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1249D was approved by the Committee in October 2021.

This instruction is drafted for offenses involving reckless physical abuse of an elder person causing great bodily harm as provided in Wis. Stat 940.198(3)(a). § 940.198(3)(a) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a “substantial risk of great bodily harm,” with the fact that the victim was over age 62 creating “a rebuttable presumption of conduct creating a substantial risk of great bodily harm.”

Subsection (2m) of § 939.66 provides that “a crime which is a less serious or equally serious type of battery than the one charged” qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of “elder person” is the one provided in § 940.198(1)(a) which provides: “Elder person” means any individual who is 60 years of age or older.”

2. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

If a more extensive definition of “cause” is necessary, see Wis JI-Criminal 901.

3. See § 939.22(14) and Wis JI-Criminal 914. The reference to “other serious bodily injury” at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an “ejusdem generis” rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as “serious bodily injury” is sufficient in most cases.

Whether or not an injury suffered amounts to “great bodily harm” is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

4. The definition of “recklessly” is the one provided in § 940.198(1)(b). Note that this definition is different from the definition of “criminal recklessness” in § 939.24.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though “recklessly” is defined differently in § 940.198(1)(b), the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

6. This is the standard statement that is used in other instructions where the victim’s age is an element and is based on the rule stated in § 939.43(2). Although that statute refers to “the age of a minor,” sub. (4) of § 940.198 provides a similar rule for this offense: “This section applies irrespective of whether the defendant had actual knowledge of the crime victim’s age. A mistake regarding the crime victim’s age is not a defense to prosecution under this section.” The Committee concluded that the standard statement is

clearer; no change in meaning is intended.